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No. 176

IN THE

Supreme Court of the United States

October Term, 1967

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER

Appellees

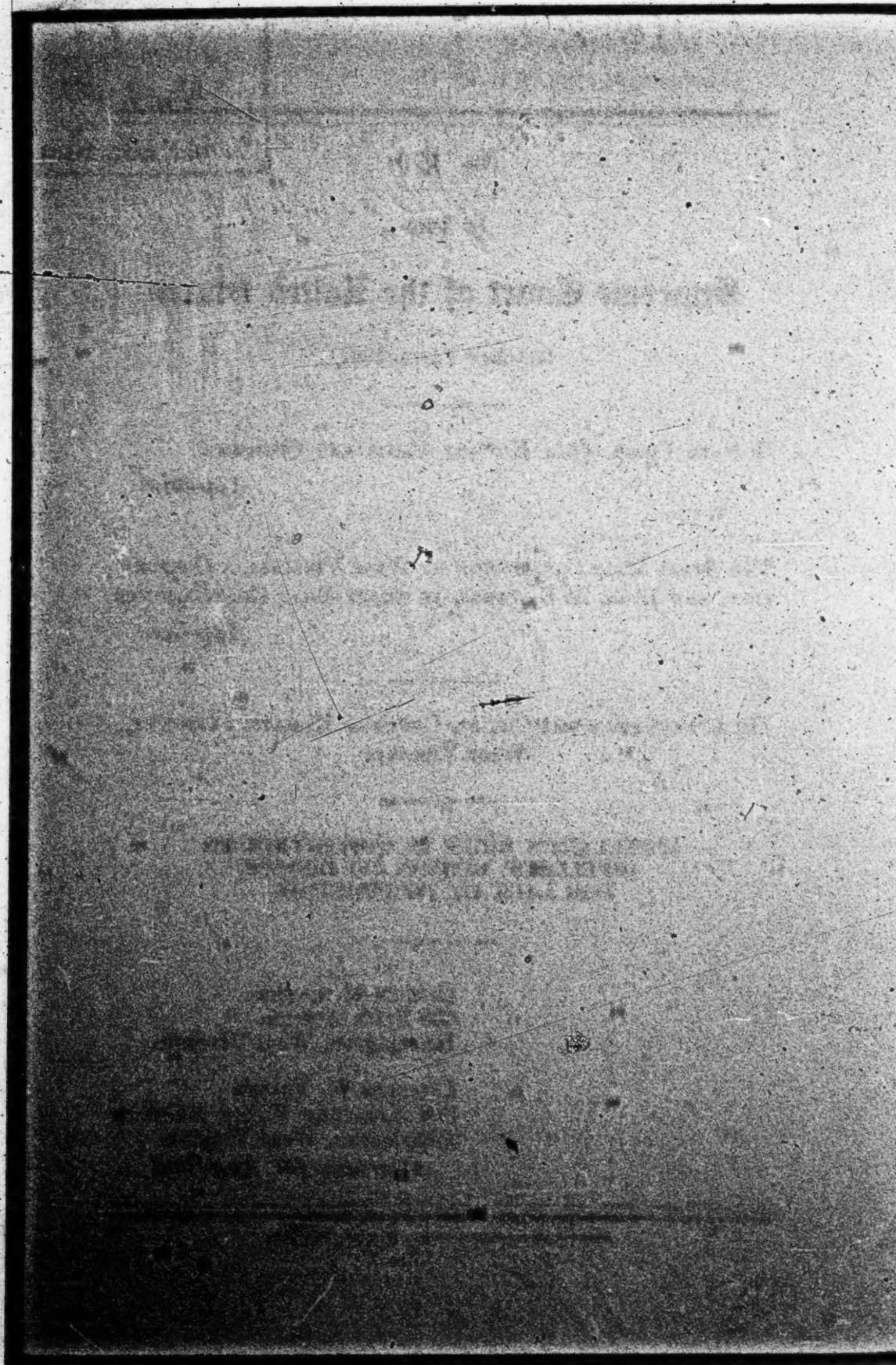
ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

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STATEMENT OF THE CASE

The petition avers, and for jurisdictional purposes here as well as on the demurrer in the trial Court, it must be taken as true, *Ickes v. Fox*, 300 U.S. 82, 96, that by arbitrary action of the State Road Commissioner under color of office and without authority, the Road Commission wrongfully abrogated Appellant's interstate highway construction contract, put him off the project, and appropriated his work, services, labor, and material of the value of $1,387,046.55 which were incorporated in the public highway for public use. The petition was to compel the Appellees to institute eminent domain proceedings to legally acquire and pay for Appellant's property. *The appropriation of Appellant's property for public use without compensation and without due process of law is the major thrust of Appel-*

lant's petition. Appellees met Appellant's charges with a demurrer, interposing as a bar the absolute immunity provision of Section 35, Article VI, of the State Constitution. *The trial Court applied the immunity provision to this case* and turned Appellant out of Court.

ARGUMENT

I

APPELLEES' CONTENTION OF ADEQUATE NON-FEDERAL GROUND IS FRIVOLOUS AND WITHOUT MERIT

Appellees rest this contention on the fact that the trial Court held this was not a proper "subject" for an eminent domain proceeding. However, such holding (Juris. Statement, Appendix D, Letter Opinion Of Trial Court dated March 11, 1966, pp. 89a, 90a) is based upon, and the result of, the interposition of the State Constitutional immunity provision, *the application of which to the facts of this case is the very Federal ground on which this appeal is taken.* This proceeding from its inception and on this appeal, has been focused on the clear conflict between Appellant's Federal constitutional rights and the application of the State constitutional immunity provision, the latter of which under the Supremacy Clause of Article VI, Clause 2, of the Federal Constitution, must give way. *Hamm* v. *City of Rock Hill*, 379 U.S. 306; *Hill* v. *Florida*, 325 U.S. 538; *Pardee* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184.

Appellees' contention begs the very question which Appellant seeks to have determined. It ill becomes Appellees to challenge the propriety of the very remedy which it represented in the prior appeal to be proper and available. (Juris. Statement, Appendix B, Motion To Dismiss, pp. 79a, 84a). Constitutional rights are not so ephemeral as to be resolved by such trifling expediency.

II

THE POSSIBILITY OF A LEGISLATIVE GRATUITY IS NOT A REMEDY AND DOES NOT SATISFY THE REQUIREMENTS OF DUE PROCESS

Appellees repudiated in the trial Court their representations to this Court in the prior appeal that this mandamus proceeding is an effective State remedy. They now have the temerity to come again in this Court and brazenly suggest that Appellant should try another of Appellees' "remedies". Appellees' demurrer was not grounded on choice of remedy, but solely on the trial Court's lack of jurisdiction to afford any judicial remedy to Appellant on the basis of the constitutional immunity provision. *It is both the previous declaratory judgment proceeding and in this mandamus proceeding, the trial Court has held Appellant has no remedy whatsoever.*

Appellees contend that effective July 1, 1967, with the creation of the "Court of Claims" (Chap. 14, Art. 2, Code of West Virginia, 1931, As Amended By Enrolled Senate Bill 332, West Virginia Legislature, 1967), Appellant can now present his claim to such "Court". This is patently an *ad hoc* argument to try to again avoid this Court's jurisdiction. The newly established "Court Of Claims" *is not a judicial body.* It is not a part of the judicial branch of the state government, *but is simply an advisory body to the Legislature.* It considers and advises the Legislature on claims which the Legislature *might* deem moral obligations. *There is no appeal from the "Court's" advice to the Legislature or the Legislature's action or lack of action on such advice.* Appellees recognize its lack of effectiveness with their statement that "the Court of Claims findings are not binding on the Legislature". (Motion To Dismiss Appeal, p. 3).

Appellees now say that it is the only "remedy" which the State has provided in such a case as at bar. We submit that *it is no remedy at all,* and that it is the very lack of

an effective State remedy, *by reason of the application of the constitutional immunity provision*, as has already been twice patently determined by the State judiciary, which is the gist of this appeal.

Appellees' suggestion is that Appellant may pursue his claim solely as a *moral obligation* of the State, and not as a *legal right*. It should be noted that the statute relating to claims before the "Court Of Claims" *expressly excludes* any claim:

> "5. With respect to which a proceeding may be maintained against the state by or on behalf of the claimant in the courts of the state".

Thus, *all other considerations aside, it is apparent that Appellees' suggestion begs the question as to whether Appellant should be provided a judicial forum in order to enforce his rights, for by the very terms of the statute, the procedure cannot be availed of if a judicial remedy is proper.*

This statute provides for the presentation of a claim to the "Court Of Claims" to the end that it *may, in its discretion*, recommend to the Legislature that such claim be recognized as a *moral obligation* of the State, and for which the Legislature *may, in its discretion*, make an appropriation for its satisfaction on the basis of the complete absence of any judicially recognizable legal right.

It has been held insofar as Federal officials are concerned, that in the event of abuse of power of office, a claimant will not be relegated to a court of claims. *Land* v. *Dollar*, 330 U.S. 731, 738. This is especially true in cases such as at bar, for constitutional rights are peculiarly within the sphere of judicial protection. The Constitution which guarantees Appellant's rights, likewise insures them the privilege of having those rights *judicially protected*. *Lawrence* v. *State Tax Comm.*, 286 U.S. 276.

What Appellees are in essence suggesting, is that Appellant *be denied the judicial forum* and forced to submit the protection of his property and his constitutional rights to the *whim and caprice of the legislative political arena from which there can be no appeal.* It is a *cul de sac.*

Appellant's constitutional rights of due process and protection of his property against public use without compensation are not to be so lightly treated. A recommendation by a "Court Of Claims", in its discretion to be *made or denied,* for a legislative gratuity, in its discretion to be *given or withheld,* by its inherent limitation, is not and cannot be due process of law. The Rule Of Men as expressed in legislative discretion cannot be substituted for the Rule Of Law guaranteed by the principles of due process.

CONCLUSION

Probable jurisdiction should be noted; the judgment of the trial Court reversed; and this Court should enter, or direct the trial Court to enter, an order compelling Appellees to institute an eminent domain proceeding to acquire Appellant's property as sought in the mandamus petition.

July 3, 1967.

Respectfully submitted,

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